

Forest Service Response to Comments on Proposed FS-2400-6 and FS-2400-6T Contracts

Eleven responsive comments suggesting changes to the proposed contract were received. Two responses were received from forest industry associations, eight responses were received from Forest Service employees, and one response was received from an individual that did not identify an affiliation.

- **General**

Comment 1: Convert the contract to an active voice and implement other clear writing techniques.

Response: The proposed changes given in the example are extensive. It would be difficult to revise the contract in this manner without making subtle and unintended changes in contract meaning and interpretation. Much of the language in the contract has been reviewed by courts and has an established meaning. Changes as extensive as are proposed would require another round of public comment and would negate much of the extensive review that other parties have done. Therefore, no changes were made based on this suggestion.

Comment 2: There are references throughout Division B/BT to the special provisions in Division C/CT. Not all Regions use these C/CT provisions.

Response: There is no expectation that every contract will have a special provision for every one that is referenced. However, the C/CT provisions referenced are the ones that are generally necessary on most contracts.

Comment 3: The Acrobat format of the contract causes some letters to merge or overlay each other and sometimes makes words appear to be misspelled.

Response: We will consider other formats for the contract or examine methods to correct this.

- **A/AT Preamble**

Comment: The contract should reference attachments that are referred to in Division B/BT, such as the Road Maintenance Specifications.

Response: A reference to Division B/BT was added to the preamble.

- **A/AT4 Timber Payment Rates**

Comment: Add a new column to A/AT4a - Species and Products to be Paid for at Rates Escalated under B/BT3.2 and A/AT4b - Species and Products to be Paid for at Flat Rates for

road maintenance deposits required by C/CT5.32 - Road Maintenance Deposit Schedule. This would consolidate deposits in one spot and simplify the contract.

Response: If road maintenance were the only other required deposit this suggestion would be easy. However, depending on the contract there may also be deposits for scaling and erosion control. Therefore, this suggestion was not incorporated into the proposed revised contract.

- **A/AT10 Estimated Cost of Specified Roads (Existing)**

Comment: Since this special condition is being replaced with the Schedule of Items, the contract should clarify the location and contents of the Schedule of Items.

Response: The Forest Service agrees and has added a definition for the Schedule of Items to B/BT5.2 - Specified Roads.

- **A/AT11 Base Course, Surface Rock, and Rock Riprap (Existing)**

Comment: Since this special condition is being replaced with the Schedule of Items, the contract should clarify the location and contents of the Schedule of Items.

Response: The Forest Service agrees and has added a definition for the Schedule of Items to B/BT5.2 - Specified Roads.

- **A/AT12 Culvert Cost Rates (Existing)**

Comment: Since this special condition is being replaced with the Schedule of Items, the contract should clarify the location and contents of the Schedule of Items.

Response: The Forest Service agrees and has added a definition for the Schedule of Items to B/BT5.2 - Specified Roads.

- **A11 Minimum Scaling Volumes**

Comment: This special condition can be eliminated since it is not used with contract or force account scaling.

Response: Bureau scaling continues to be used in the Alaska Region. In addition, there may be situations with weight scaling where this provision may have applicability. Therefore, it is not being removed from the contract.

- **A18/AT15 Downpayment**

Comment: It was recommended that the interest rate for a late downpayment be included in the contract.

Response: The interest rate and remedies for late down payments are included on the bid form. The remedies for a late down payment, including application of the interest rate to the downpayment amount, occur prior to execution of the contract. Therefore, there is no benefit to stating the interest rate in the contract.

- **B1.1 Sale Area Map**

Comment 1: This provision, as well as B6.36 - Acceptance of Work, should reference eliminating cutting units for the sale area, rather than subdivisions. Subdivisions are usually much larger than cutting units and do not provide for an orderly reduction of the sale area as work proceeds. From a liability standpoint this would provide better protection for both the purchaser and Forest Service and would be more consistent with the elimination of payment units in FS-2400-6T contracts.

Response: The Forest Service agrees with this comment and has modified B1.1 and B6.36 in response to it and, in addition, has modified B9.21 for consistency.

Comment 2: Paragraph (g) implies that rock sources are always shown on the sale area map.

Response: Since rock sources are only shown on the sale area map when there is a source on National Forest land, or there is an agreement with a private party, and C/CT5.221 - Material Sources is included in the contract. This paragraph is clarified by adding a reference to C/CT5.221.

Comment 3: Paragraph (h) should reference both hauling and use, since B/BT5.12 - Use of Roads by Purchaser and C/CT5.12 - Use of Roads by Purchaser deal with both hauling and use.

Response: The Forest Service agrees and has added a reference to use in paragraph (h).

Comment 4: Paragraph (k) addresses only biological and cave resources. B/BT6.24 - Protection Measures Needed for Plants, Animals, Cultural Resources, and Cave Resources refers to resources shown on the sale area map or identified on the ground, indicating that it is not necessary to show the resources on the sale area map.

Response: Biological and cave resources will be shown on the sale area map. Cultural resources are not put on the sale area map because the map is a public document and we do not want to disclose the locations of these resources to the public. The instructions to C/CT6.24 -

Site Specific Special Protection Measures explain what resources to show on the sale area map and what resources to identify in other ways for the purchaser.

Comment 5: Paragraph (s) should reference both Division B/BT and C/CT.

Response: The Forest Service agrees and has added a reference to Division B/BT.

- **B/BT2.15 Construction Timber**

Comment: (2 respondents) The word live should be taken out so that construction timber may be either live or dead.

Response: The Forest Service agrees and has changed the provision to allow both live and dead construction timber.

- **B/BT2.3 Timber Designations**

Comment: This provision ought to specify that boundary trees not be cut.

Response: The Forest Service agrees and has incorporated a sentence to this effect.

- **B/BT2.31 Clearcutting Units**

Comment: There is a conflict between B/BT2.31 - Clearcutting Units and B/BT3.41 - Material Not in A2 / Material and Quantities Not in AT2 because B/BT2.31 designates all trees meeting utilization standards for cutting, while B/BT3.41 provides that species and products not listed in A/AT2 - Volume Estimate and Utilization Standards may be cut with Contracting Officer approval.

Response: The Forest Service does not believe that there is a conflict between these two provisions. If a species or product is not listed in A/AT2 it does not meet utilization standards because there are no standards to meet.

- **B/BT2.32 Construction Clearing**

Comment: The provision should be revised to include temporary roads.

Response: The Forest Service agrees and has made this change.

- **B/BT2.37 Minor Changes/Designation Changes**

Comment: This provision should be revised to provide for boundary changes along the sale area boundary where such expansion is covered by an environmental assessment.

Response: This proposed change is unnecessary and conflicts with direction from the Comptroller General that timber cannot be added outside the sale area boundary. The purpose of the provision is to make minor changes to correct timber sale preparation errors. There is seldom an occasion where a minor change would not be possible because of the sale area boundary location.

- **B/BT2.41 Adjustment for Volume Deficit/Adjustment for Quantity Deficit**

Comment: The requirement for the Contracting Officer to determine that there is a volume shortage should be removed.

Response: The intent of designating the Contracting Officer is not to deny the purchaser the benefits of this provision but only to identify who makes this determination.

- **B/BT2.42 Adjustment for Excess Volume/Adjustment for Excess Quantity**

Comment: The requirement for the Contracting Officer to determine that there is a volume surplus should be removed.

Response: The intent of designating the Contracting Officer is not to deny the purchaser the benefits of this provision but to identify who makes this determination.

- **BT2.43 Adjustment of Quantity Errors**

Comment: Revise title of provision to "Adjustment for Quantity Errors."

Response: This is a good editorial change and was incorporated into the contract.

- **BT3.1 Current Contract Rates**

Comment: Rates established by rate redetermination should apply to timber that has not been released for cutting; otherwise it will be difficult to determine the appropriate volume and value.

Response: The Forest Service disagrees. This paragraph attempts to compensate purchasers for changes in value due to environmental modification, catastrophic damage, or market change

during an interruption. Not including the value of timber in partially cut timber units would cause this provision to fail in this objective.

- **B/BT3.2 Escalation Procedure**

Comment: It is recommended that escalation not exceed 50 percent on sales that contain 50 percent or more helicopter logging.

Response: This is a proposed complication of the contract with little benefit. The cost of logging is irrelevant. If stumpage values are low because of helicopter logging, escalation has little effect. If there is a large amount of helicopter logging and stumpage is still significantly above base rates, then there is no reason that the purchaser should not get the full benefit of a reduction in stumpage rates due to a poor market or the Government gets the benefit of market increases.

- **B/BT3.3 Rate Redetermination**

Comment 1: The word "all" should be removed from the last sentence of the second paragraph, so that it reads: "Such methods shall take into consideration [all] factors that may affect timber value at rate redetermination date."

Response: The Forest Service agrees. It may not be possible to identify all factors. We need to consider identifiable factors that affect timber value in a measurable and meaningful amount.

Comment 2: It is unclear what conditions or premises need to exist to provide for base indices to be redetermined.

Response: Base indices are only redetermined with scheduled rate redeterminations, so this requirement was removed from this provision and added to C/CT3.35# - Scheduled Rate Redetermination. For consistency, the requirement was also removed from the definition of base indices in A/AT4 - Payment Rates.

Comment 3: There should be a mechanism to pay the purchaser to harvest the sale in situations where reduced timber values cannot be recognized with a reduction in rates.

Response: This provision provides overall guidance for all rate redeterminations, but it is specifically used for rate redeterminations where the purchaser has failed to complete the contract by the termination date. In this situation, redetermined rates can only increase, so this suggestion is not relevant.

- **B/BT3.31 Rate Redetermination for Environmental Modification**

Comment 1: In cases where the sale is deficit after environmental modification, the deficit amount must be reimbursed in cash.

Response: This proposal could increase the Government's financial obligations under the contract and affect the ability to proceed with other timber sales. If operation of the sale is uneconomic to the purchaser after environmental modification, then the purchaser has the option of not agreeing to the contract modification, which in most cases would result in termination under B/BT8.34 - Contract Termination or may, in limited situations, result in changes in the sale to make it more economic. If the timber removal is such that it must be done to achieve land management goals, and the funding is available, the Government could proceed with an acquisition contract.

Comment2: A minor editorial change was suggested for clarity, specifically to insert the word "said" into the first sentence of the second paragraph.

Response: The Forest Service agrees and has made this change.

- **B/BT3.32 Rate Redetermination after Catastrophic Damage**

Comment: A minor editorial change was suggested for clarity, specifically to insert the word "said" into the first sentence of the second paragraph.

Response: The Forest Service agrees and has made this change.

Comment 2: There should be a mechanism to pay the purchaser to harvest the sale in situations where reduced timber values cannot be recognized with a reduction in rates.

Response: This proposal could increase the Government's financial obligations under the contract and affect the ability to proceed with other timber sales. If the changes due to catastrophic damage have reduced the value to such an extent that the sale appraises negatively, the purchaser has the choice to operate the sale or have the sale terminated under B/BT8.221 - Termination by Purchaser. If the timber removal is such that it must be done to achieve land management goals, and the funding is available, the Government could proceed with an acquisition contract.

- **B/BT3.33 Rate Redetermination for Market Change**

Comment 1: The period of delay should be more than 60 days to activate this provision, perhaps 120 days or 6 months.

Response: The Forest Service agrees. The time has been changed to 90 days to be consistent with several other provisions relating to changes under B/BT8.33.

Comment 2: The period for measuring the market change should be 30 days, because of the risk of deterioration in warm weather.

Response: The purpose of this provision is to reflect changes in markets, not losses of value in felled or salvage timber. The purchaser is compensated for loss of value due to deterioration under provision B/BT8.12 - Liability for Loss.

Comment 3: For BT3.33 only, there may be an inconsistency between the fourth paragraph of BT3.1 - Current Contract Rates and the last paragraph of BT3.33 - Rate Redetermination for Market Change.

Response: The rates apply to timber removed subsequent to the interruption. All of the rate redetermination provisions are consistent.

Comment 4: The 60-day period should be within the normal operating season.

Response: This is one of several remedies arising under B/BT8.33. The Forest Service agrees that those remedies should only be available when operations would otherwise have proceeded had there been no suspension but also recognized that scheduled operations often occur outside the normal operating season. Only recognizing time lost during the normal operating season would be overly restrictive. B/BT3.33 was changed to 90 days to be consistent with other provisions, and B/BT8.33 was clarified to address interruption of scheduled operations.

Comment 5: There should be a mechanism to pay the purchaser to harvest the sale in situations where reduced timber values cannot be recognized with a reduction in rates.

Response: This provision was designed to compensate the purchaser to the extent possible for actions by the Government over which the purchaser had little control. If this compensation is not adequate, the Government may also be proposing a contract modification. If the purchaser does not accept the contract modification the sale will probably move to termination and the purchaser will be relieved of the deficit sale. Provision B/BT8.36 Termination for Market Change provides an additional avenue for terminating a contract that is no longer economical to operate.

- **B/BT3.34 Emergency Rate Redetermination (Proposed)**

Comment: There should be an explicit provision for an emergency rate redetermination if economic factors impact sale operability. This should include, but not be limited to market conditions and should also be available in Regions that do not have escalation.

Response: The Forest Service agrees but had to develop a new basis for when this would trigger. In the past, the contract included a provision for an emergency rate redetermination on sales that had a scheduled rate redetermination. An emergency rate redetermination was not effective until after the first scheduled rate redetermination (normally at year 5) and was triggered if the value of the sale was reduced by an amount equal to the profit and risk allowance under residual value appraisal procedures. To recognize the need to address severe market declines, the Forest Service has developed a new provision for an emergency rate redetermination. This new provision provides purchasers with a reduction in contract rates through an emergency rate redetermination if the market has declined by 25 percent since the award date, based on the Producer Price Index. This method was selected over the previous procedure since with transaction evidence appraisals it is not possible to use the profit and risk allowance to measure the market change, nor is it possible to reflect general economic factors other than the market. The method will apply to both flat rate and escalated sales regardless of the appraisal methods used.

- **B/BT3.41 Material Not in A2 / Material and Quantities Not in AT2**

Comment 1: (2 respondents) The first paragraph appears to be incomplete. It needs to address more than incidental amounts.

Response: The first paragraph got garbled during editing and is incomplete. It is corrected so that it now addresses removal of both incidental amounts of material and greater quantities.

Comment 2: Removal of incidental amounts of material should not require Contracting Officer approval.

Response: The first paragraph got garbled during editing and is incomplete. It is corrected so that approval by the Contracting Officer is not needed.

Comment 3: Removal of more than incidental amounts of material should require Contracting Officer approval.

Response: The first paragraph got garbled during editing and is incomplete. It is corrected to require Contracting Officer approval for removal of more than incidental amounts.

Comment 4: (2 respondents) For species not listed in A/AT2 - Volume Estimate and Utilization Standards, there should be a provision for agreement on rates of payment.

Response: The Forest Service agrees that there needs to be agreement on rates of payment for material not in A/AT2 and added that requirement to B/BT3.41.

Comment 5: Incidental amounts should be defined.

Response: What may be considered incidental can vary with particular situations on the ground. Generally speaking, incidental amounts are quantities that are not intentionally sorted or removed.

- **B3.44/BT3.43 Undesignated Timber Damaged Without Negligence**

Comment: This provision should be consistent with B/BT3.42 - Timber Cut Through Mistake and B3.45/BT3.44 - Undesignated Timber Unnecessarily Damaged or Negligently or Willfully Cut, both of which require Contracting Officer approval for removal of damaged timber. B3.44/BT3.43 only requires approval by the Forest Service.

Response: B/BT3.42 and B3.45/BT3.44 both involve review by Law Enforcement and consideration of possible criminal violation. B3.44/BT3.43 relates to routine damage. Therefore, the difference in approval authority is appropriate.

- **B3.46/BT3.45 Liquidated Damages**

Comment: The phrase "and in addition to" should be added for clarity.

Response: This phrase was removed in the proposed contract because it was causing confusion. Some Contracting Officers were interpreting liquidated damages to be double stumpage, and then if they granted the purchaser approval to remove the timber, charged them again for stumpage. The intent was that liquidated damages would be single stumpage; then if the purchaser removed the timber, they paid stumpage. The Forest Service believes that the provision is clearer, as written.

- **B/BT4.21 Cash Deposits**

Comment: Cash should be defined, particularly given that we are giving credits to purchasers for increases in road costs.

Response: It is not necessary to define cash in the contract. Cash is anything that shows up on the timber sale account other than bond coverage. Thus, purchasers may request a refund if they are given a credit for increased road costs.

- **B/BT4.213 Periodic Payment Schedule**

Comment: This provision does not address how to adjust periodic payments. Only B/BT8.212 - Market Related Contract Term Addition provides guidance.

Response: The Forest Service agrees that this provision should provide more specific direction. Specifically, that the due dates for periodic payments are delayed by the amount of additional time granted. With this change the last paragraph of B/BT8.212 is unnecessary and redundant and is removed. Additionally, since Urgent Removal Extensions (36 CFR 223.53) provide for adjusting periodic payment dates that have not been reached, the first sentence of the last paragraph under B/Bt4.213 was changed to distinguish those from extensions under B/BT8.23.

- **B/BT4.214 Deposits for Charges Subject to Escalation**

Comment 1: Delete the word "cash" at the beginning of the provision, as deposits may be in other than cash.

Response: The Forest Service agrees and has made this change.

Comment 2: Eliminate the exception on determining charges subject to escalation of market changes greater than 5 percent.

Response: Making this change will significantly simplify the application of escalation. The Government's stumpage receipts will be unchanged. In rapidly changing markets, the purchaser's deposits may be marginally too much or too little. The simplification of this procedure justifies the lack of precision in deposits.

- **B/BT4.22 Temporary Reduction of Downpayment**

Comment: The 60-day period should be within the normal operating season.

Response: This is one of several remedies arising under B/BT8.33. The Forest Service agrees that those remedies should only be available when operations would otherwise have proceeded had there been no suspension but also recognized that scheduled operations often occur outside the normal operating season. Only recognizing time lost during the normal operating season would be overly restrictive. B/BT4.22 was changed to 90 days to be consistent with other provisions, and B/BT8.33 was clarified to address interruption of scheduled operations.

- **B/BT4.4 Payments Not Received**

Comment: There is an apparent inconsistency because paragraph (b) provides for a 30-day period for remedy of a breach, yet it requires that we make demand on the surety 10 days after notification of breach.

Response: The purchaser's 30 day period for breach remedy and demands on surety are separate actions and do not conflict.

Comment: The Debt Collection Act (as amended) allows agencies to use a higher rate of interest to protect the Government. Why was this provision changed to disallow use of the Prompt Payment Interest Rate which is a higher rate of interest?

Response: After researching this further it was established that although the Prompt Payment Method for calculating interest does not apply to the timber sale contract, the Prompt Payment Interest Rate can be used. The contract was changed back to allow this.

- **B/BT5.1 Authorization**

Comment: This provision includes the phrase "and completing conservation projects." If this phrase is to be included it should also be in the preamble.

Response: This is an unintended editorial error and the phrase has been removed.

- **B/BT5.12 Use of Roads by Purchaser**

Comment 1: The provision should also authorize the purchaser's use of existing non-system temporary roads.

Response: Use of temporary roads requires Forest Service approval and a determination of whether they require reconstruction. System roads should meet certain standards unless they are listed in C/CT5.12# - Use of Roads by Purchaser as restricted. Non-system roads could be anything from an off-road vehicle track to a former logging road. Given this, they need evaluation prior to use. Therefore no changes were made based on this comment.

Comment 2: One respondent expressed concern about the Forest Service assuming responsibility to determine when hauling will not cause resource damage and that there is no longer a reference to hauling safely.

Response: The Forest Service is responsible for the protection of resources on National Forest land and has a responsibility to determine when hauling will not cause damage to those

resources. The purchaser is responsible for safety in hauling. Safety is specifically addressed under B/BT6.33.

- **B/BT5.211 Contract Plans**

Comment: While the working tolerances paragraph is not in conflict with Standard Specifications, it does not add anything to specification FP 106.01. Since FP 106.01 has clearer wording this paragraph should be removed.

Response: The Forest Service agrees and has removed the construction tolerances paragraph.

- **B/BT5.212 Construction Staking**

Comment: The replacement of stakes damaged and replaced by the purchaser should be done to an established standard and completed re-staking should be subject to Forest Service approval.

Response: There are accepted engineering standards for construction staking. The objective of this comment can be met by requiring Forest Service approval of the purchaser's construction staking work; and a sentence to this effect was added to the provision.

- **B/BT5.22 Material Delivery**

Comment: The phrase "due to purchaser's negligence" was removed in the proposed contract and should be reinserted.

Response: The Forest Service agrees that the purchaser should be responsible for loss or damage to materials due to purchaser's negligence. The phrase was restored to the contract.

- **B/BT5.23 Use of Partially Constructed Roads**

Comment 1: (2 respondents) The delegation of authority for use of partially constructed roads should be to the Forest Service, rather than the Contracting Officer.

Response: The Forest Service believes that delegation to the Contracting Officer is appropriate. Use of partially completed roads could have significant resource impacts.

Comment 2: (2 respondents) The delegation of authority for determining if ground conditions permit hauling without undue damage should be to the Forest Service, rather than the Contracting Officer.

Response: The Forest Service believes that delegation to the Contracting Officer is appropriate. Use of partially completed roads could have significant resource impacts.

Comment 3: The definition of "substantially completed" changes as ground conditions change. The definition should have nothing to do with ground conditions.

Response: The Forest Service agrees and has revised the definition and wording of the second paragraph to reflect this suggestion.

Comment 4: Proposed contract wording would allow use of roads requiring reconstruction prior to being completed, rather than requiring completion prior to use.

Response: Reconstruction is included in the contract to increase safety or to correct resource problems that timber hauling could aggravate. However, there may be situations where it's acceptable to permit hauling before all work is completed. An example of this would be where erosion control seeding must be delayed until acceptable conditions occur for seeding.

Comment 5: Proposed contract wording would allow hauling of timber felled in construction and timber logged directly to a road prior to the road being substantially complete, rather than allowing this only when it is necessary to facilitate construction.

Response: The provision identifies limited situations where timber felled in construction and timber logged directly to the road from areas immediately adjacent thereto may be hauled before road construction is substantially completed. However, this is contingent upon a determination from the Contracting Officer that there is justification under existing conditions and that ground conditions will permit hauling without undue damage. The provision also limits the amount of timber that can be hauled prior to applying the base course.

- **B/BT5.25 Construction Cost Adjustment**

Comment 1: The adjustment to the purchaser's timber sale account should be when the road segment is accepted, without regard to whether it is a debit or credit.

Response: The Forest Service agrees with this comment and has modified the provision wording to implement it.

Comment 2: Paragraph (b) is unnecessary if paragraph (a) is followed, since if there is no timber value the purchaser will be given payment with appropriated funds that the Forest Service will be unable to restore.

Response: The Forest Service agrees with this comment and has modified the provision wording to implement it.

Comment 3: The Timber Sale Accounting System does not allow credits to the purchaser's account unless there is stumpage value above base rates.

Response: If there is no stumpage value above base rates the increase in cost will have to be paid with appropriated funds.

Comment 4: In paragraph (b) replace "at sale closure" with "when all volume is removed."

Response: Elimination of paragraph (b) (see Comment 2: makes this change unnecessary.

- **B/BT5.251 Variation in Quantities**

Comment 1: Clarify the proposed language related to quantity variations that are subject to this contract provision to make the provision more consistent with the road specifications.

Response: The Forest Service agrees with the proposed minor edit.

Comment 2: The provision no longer requires that the timber sale account be adjusted to reflect cost differences in road construction. A sentence to this effect should be added.

Response: The preamble to Division B/BT makes it clear that requirements in Subsections apply to Items within that Subsection. Further, B/BT5.25 - Construction Cost Adjustment specifically references that it applies to this provision. Therefore, adding the proposed sentence is redundant.

- **B/BT5.252 Physical Change**

Comment 1: One respondent recommended increasing the threshold for compensating the purchaser for additional costs attributed to a physical change from \$1,000 to \$10,000.

Response: The Forest Service agrees with updating this value to reflect over 30 years of inflation.

Comment 2: The provision no longer requires that the timber sale account be adjusted to reflect cost differences in road construction. A sentence to this effect should be added.

Response: The preamble to Division B/BT makes it clear that requirements in Subsections apply to Items within that Subsection. Further, B/BT5.25 - Construction Cost Adjustment

specifically references that it applies to this provision. Therefore, adding the proposed sentence is redundant.

- **B/BT5.253 Design Change**

Comment: The provision no longer requires that the timber sale account be adjusted to reflect cost differences in road construction. A sentence to this effect should be added.

Response: The preamble to Division B/BT makes it clear that requirements in Subsections apply to Items within that Subsection. Further, B/BT5.25 - Construction Cost Adjustment specifically references that it applies to this provision. Therefore, adding the proposed sentence is redundant.

- **B/BT5.27 Temporary Credit for Unamortized Specified Road Construction**

Comment 1: The Forest Service may breach this provision in cases where there are inadequate appropriated funds to reimburse the purchaser. The Contracting Officer ought to be able to decide whether to return the unamortized specified road construction cost to the purchaser and, if it is not returned, provide interest on the amount as part of damages.

Response: A respondent has misread this provision. The amount of reimbursement is limited to the amount of stumpage value above base rates. Therefore, no change was made based on these comments.

Comment 2: An alternative to this provision would be to pay interest on the purchaser's road investment.

Response: Earning interest, payable later as part of damages, does little to alleviate what may be a significant cash flow problem for a purchaser that has a large investment in roads and no timber to harvest. In addition, this provision will mitigate the Forest Service's damages when there is stumpage value available to return to the purchaser.

Comment 3: The 60-day period should be within the normal operating season.

Response: This is one of several remedies arising under B/BT8.33. The Forest Service agrees that those remedies should only be available when operations would otherwise have proceeded had there been no suspension, but also recognized that scheduled operations often occur outside the normal operating season. Only recognizing time lost during the normal operating season would be overly restrictive. B/BT5.27 was changed to 90 days to be consistent with other provisions, and B/BT8.33 was clarified to address interruption of scheduled operations.

Comment 4: The amount of reimbursement is limited to the amount of stumpage value above base rates. The amount of reimbursement should be the full cost of unamortized road construction.

Response: The amount of reimbursement is limited to stumpage above base rates because any reimbursement above that amount would have to come from appropriated money that may not be available. Using appropriated money in this manner would adversely affect the timber sale program. Further, there is no fiscal mechanism to replace the appropriated money with receipts from timber harvest when harvest resumes.

Comment 5: The 60-day period should be 30 days.

Response: The 60-day period, which was changed to 90 days based on another response, is used throughout the contract to represent a suspension of substantial length. Use of a 30-day period would require many contract adjustments for suspensions of shorter duration. The Forest Service believes that use of the 90-day period is the best compromise between immediately eliminating all costs to a purchaser and extensive and frequent contract modifications.

Comment 6: The Contracting Officer should not have the discretion to reimburse the purchaser for unamortized specified road construction cost when the purchaser fails to request such reimbursement.

Response: The provision has two objectives: a) to minimize the financial burden of suspensions on purchasers, and b) to mitigate the Forest Service's potential contract liability from suspensions. Allowing the Contracting Officer to reimburse the purchaser helps to mitigate the Forest Service's damages.

Comment 7: Confusing language is used to accomplish the accelerated payback once the suspension has been lifted.

Response: Applying suggestions from the respondent, the accelerated payback wording was rewritten to be clearer.

- **B/BT5.4 Use by Others**

Comment 1: Replace Forest Service (second paragraph) with Contracting Officer.

Response: The Forest Service agrees that this authority should be at the Contracting Officer level.

Comment 2: The proposed language allows use after the Contracting Officer determines the fair share of road maintenance costs, rather than requiring the third party to pay this cost.

Response: The respondent's suggestion was accepted because it better describes the intent of the provision.

Comment 3: The word "assure" was used, while the correct word was "ensure."

Response: This correction was made.

- **B/BT6.01 Statutory Compliance**

Comment: A respondent recommended deleting this provision to eliminate the perception that the Forest Service is responsible for enforcing laws of other Agencies or governments. Or, alternatively, if the provision is retained, start the provision with "Notwithstanding the Forest Service's designated authority to enforce, Purchaser agrees..."

Response: The Forest Service agrees that this provision should be deleted. Purchasers have an obligation to abide by the requirements of other Agencies and governments, in any case.

- **B/BT6.1 Representatives**

Comment: Clarify that only delegated Forest Service representatives have authority under the contract.

Response: The Forest Service agrees that this change will help to make it understood who can take action under the contract.

- **B/BT6.2 Improvements**

Comment: Suggest defining individuals acting in the course of their employment for the purchaser using the same language as B/BT6.3.

Response: Forest Service agrees made this change.

- **B/BT6.221 Protection of Improvements Not Owned by Forest Service**

Comment: The first and second paragraphs are confusing because they identify different parties as being responsible for protection of improvements.

Response: The first paragraph provides that the Forest Service notify and make arrangements with third parties. The second paragraph requires that the purchaser must conduct operations to prevent damage. These paragraphs were edited to clarify that these are separate actions.

- **B/BT6.24 Protection Measures Needed for Plants, Animals, Cultural Resources, and Cave Resources**

Comment 1: Both the purchaser and Forest Service should agree to areas needing protection at the time the contract is entered into. The respondent suggested striking the word "known," which is used to qualify the areas needing special protection.

Response: The word "known" is included because the Forest Service only has the capability to identify known areas and to identify the protection needed for known areas. At a later time, other areas may be discovered that have legislatively mandated protection requirements.

Comment 2: For clarity, a respondent's proposed suggestion would:

- a. Eliminate the general duty to protect all known and identified resources.
- b. Add an opportunity for the Contracting Officer to waive protection requirements.
- c. Eliminate the purchaser's obligation to report the discovery of new resources and to delay operations to allow for their protection.

Response: The Forest Service believes that this suggestion goes far beyond a change for clarity and significantly reduces the protection for legislatively protected resources.

Comment 3: The term "remedies" should be replaced with the term "liability."

Response: This editorial change was made.

Comment 4: The final paragraph is directly contrary to court findings and should be eliminated.

Response: The purpose of the paragraph was to remedy the findings of the court and return the contract to its intended interpretation. The Forest Service cannot warrant, no matter how intensive its resource surveys may be, that it has found every site needing protection under the law.

- **B/BT6.33 Safety**

Comment 1: The Contracting Officer should make the determination of whether there is a conflict between the contract and safety requirements.

Response: The Forest Service agrees and has incorporated this suggestion.

Comment 2: The contract fails to adequately recognize or redress the legal and practical need for the purchaser to make minor changes before or during operations to accommodate State or Federal safety requirements. The designation of every hazard tree with paint prior to cutting causes delays and expenses to the purchaser. It was suggested that a safety allowance be incorporated into B/BT2.3 - Timber Designations, B/BT2.37 - Minor Changes/Designation Changes, B/BT6.33 - Safety, B/BT6.4 - Conduct of Logging, B/BT6.41 - Felling and Bucking, and B/BT6.42 - Skidding and Yarding.

Response: The Forest Service attempts to do a careful sale layout and design with safety considerations in mind. The Forest Service conducts an on-site evaluation of the sale area to identify and reduce the exposure to danger tree hazards, while meeting resource management objectives for retaining reserve trees. Danger trees located when marking or designating the timber in the sale area are either marked for removal or avoided. If the tree is to be avoided, no trees are designated for cutting within two tree lengths.

The costs associated with safety are reflected in the appraisal. In addition, if unanticipated safety problems occur the proposed contract provides for a reduction in stumpage rates.

- **B/BT6.34 Sanitation and Servicing**

Comment: A respondent suggested that the provisions should state "...Purchaser shall conduct cleanup and restoration..." rather than " Purchaser shall conduct cleanup to restore...."

Response: The editorial change was made.

- **B/BT6.341 Prevention of Oil Spills**

Comment 1: The second paragraph has a loophole in it because oil storage could be unlimited if it was all contained in 50-gallon containers.

Response: The provision implements Environmental Protection Agency (EPA) regulations (40 CFR 112) and does not need to be modified. The EPA has recently updated this regulation.

Comment 2: Suggest defining individuals acting in the course of their employment for the purchaser using the same language as B/BT6.3.

Response: Forest Service agrees and made this change.

- **B/BT6.342 Hazardous Substances**

Comment: Suggest defining individuals acting in the course of their employment for the purchaser using the same language as B/BT6.3.

Response: Forest Service agrees and made this change.

- **B/BT6.35 Equipment Cleaning**

Comment 1: The second sentence of paragraph (c) requires off-road equipment to be made available for inspection on the sale area. The first sentence of paragraph (c) requires purchasers to clean equipment prior to its movement. These two sentences conflict.

Response: The second sentence was changed so that it no longer requires inspection on the sale area. Purchasers and the Forest Service may agree to inspect equipment at any convenient location.

Comment 2: In paragraph (b) change "may assume" to "will assume."

Response: The revised wording better describes what the Forest Service needs to do to minimize the spread of invasive species; therefore, the change was made.

Comment 3: A total rewrite to the provision was proposed. The substantive differences in this rewrite would:

a) Require purchasers to certify that the equipment is free of invasive species, rather than take reasonable measures to clean the equipment.

Response: It is not reasonable to require purchasers to certify that equipment does not harbor invasive species. The most that the Forest Service should expect is that the purchaser takes reasonable measures to assure that the equipment is free of invasive species.

b) Require a 5-day notice to the Forest Service prior to moving equipment onto the sale area, rather than a 48-hour notice when the equipment is ready to inspect.

Response: A 5-day notice prior to moving on to the sale area does not assure that the equipment is clean and ready to inspect. Allowing 48 hours for Forest Service inspection of clean equipment is more likely to assure that the equipment is clean. It is not unreasonable for the Forest Service to inspect the equipment within 48 hours.

c) Require a credit to the purchaser's timber sale account for additional protection measures if the contract is modified to prevent the spread of invasive species.

Response: Providing for reimbursement in this provision for suspension and/or modification is redundant with the requirements of B/BT8.33 - Contract Suspension and Modification, which provides: i) additional time for the delay, ii) reimbursement for out-of-pocket expenses, iii) a rate redetermination to measure any market change, and iv) a rate redetermination to reflect any increased costs of operations.

Comment 4: The provision places the burden of proof on the purchaser for identifying site-specific invasive species locations, and thus, may require unnecessary equipment cleaning and equipment idling.

Response: The purchaser is responsible for cleaning equipment if it last operated in an area infested with invasive species. The purchaser must identify where the equipment last operated. The map at the Forest Supervisor's Office will be used to determine whether the area is infested with invasive species. The purchaser does not need to make an effort to identify invasive species locations or unnecessarily clean equipment. The provision was clarified to state that the invasive species map, as well as the list of invasive species, is available at the Forest Supervisor's Office.

Comment 5: The purchaser should only be responsible for invasive species and site-specific locations identified by the Forest Service at the time of sale award.

Response: Invasive species are a significant resource issue. If additional invasive species are identified during the term of the contract, the provision provides for reimbursing the purchaser for any additional costs.

Comment 6: A proposed new sentence eliminates the need to clean equipment of invasive species unless the Forest Service demonstrates that the equipment last operated in an area with invasive species.

Response: This paragraph shifts the burden of compliance from the purchaser checking a map to determine if the equipment needs to be cleaned to the Forest Service proving that the equipment operating in an area infested with invasive species. This suggestion was not added to the contract.

Comment 7: A proposed deletion eliminates the requirement for the purchaser to identify where the equipment last operated.

Response: The location of the equipment's last operations is essential to the determination of whether it needs to be cleaned. Also see comment number 6 and its response.

Comment 8: A proposed new sentence eliminates the requirement to wash equipment in below freezing weather.

Response: The provision does not require equipment washing. There are other cleaning methods that do not require water. Further, below freezing weather or snow-cover does not eliminate the risk of spread of invasive species.

- **B/BT6.36 Acceptance of Work**

Comment 1: For B6.36 only, this provision, as well as B1.1 - Sale Area Map, should reference eliminating cutting units for the sale area, rather than subdivisions. Subdivisions are usually much larger than cutting units and do not provide for an orderly reduction of the sale area as work proceeds. From a liability standpoint this would provide better protection for both the purchaser and Forest Service and would be more consistent with the elimination of payment units in FS-2400-6T contracts.

Response: The Forest Service agrees with this comment and has modified B1.1 and B6.36 in response to it and, in addition, has modified B9.21 - Submission of Claim for consistency.

Comment 2: For BT6.36 only, whether a payment unit is part of a larger cutting unit is irrelevant to whether it should be eliminated from the sale area.

Response: The Forest Service agrees that this is an unnecessary complication to the contract and has removed this distinction.

Comment 3: The provision provides the Forest Service with a total of 15 days to inspect the work and confirm acceptance. This is unacceptably long and will delay the purchaser and force idling of equipment and employees. The inspection can reasonably be completed within 5 days of notification and acceptance or rejection should occur within 2 days after inspection.

Response: The Forest Service agrees that inspection can reasonably be completed within 5 days of notification of completed work by the purchaser and that the notification of acceptance or rejection by the Forest Service can occur within 2 days, as suggested by the respondent. The proposed contract was modified to reflect these timeframes.

Comment 4: Requiring an inspection within 10 days is redundant with the 10-day requirement of notifying the purchaser why an inspection cannot be done in 10 days.

Response: Note that pursuant to the previous comment the times were changed from 10 days to 5 days. Notwithstanding that we agree that the notice requirement may be somewhat redundant, but it is a more definitive requirement than just notifying the purchaser why the Forest Service cannot do an inspection in 5 days.

Comment 5: A respondent proposes that if the inspection cannot be completed within 5 days that the work be accepted without inspection, rather than notifying the respondent of the reason for postponement and when the inspection can be made.

Response: The work requiring inspection must be completed satisfactorily prior to acceptance. Automatically accepting the work after 5 days does not meet this requirement. Just as the contract provides the purchaser additional time when there are reasonable reasons for delay, the Forest Service needs additional time on occasion to meet its contract obligations.

- **B/BT6.412 Stump Heights**

Comment: Replace "except for acceptable high stumps provided for in this item . . . or as otherwise agreed" with "unless otherwise agreed."

Response: This is an editorial change that simplifies the provision, so the provision is changed. Exception for acceptable high stumps is provided for elsewhere in the provision.

- **B/BT6.42 Skidding and Yarding**

Comment: This clause requires grapple skidders and forwarders to have winches and many in use do not.

Response: The provision is written as intended, so that it can provide the proper resource protection and minimize damage to residual trees. Skidding equipment should be equipped with a winch, unless waived by the Forest Service. Equipment such as forwarders, generally, will not be extracting logs from sensitive areas or removing logs from locations where damage to residual trees is a concern, therefore, the winch requirement should be waived in most forwarder situations.

- **B/BT6.631 Temporary Roads to Remain Open**

Comment: Provision should require that ditches not be left with obstructions.

Response: Forest Service agrees and made this minor change.

- **B6.81 - Scaling Services**

Comment: Delete "Except for weighing," because weighing is an acceptable scaling method or service.

Response: The Forest Service does not agree with this proposed change. The wording is intended to provide more flexibility in who conducts the weighing, rather than requiring that

only the Forest Service or Forest Service contractors are allowed to perform the service. There are many third parties, such as sand and gravel companies, that have scales. In addition, since the scale does the weighing, not the person, and printouts are electronic, there are opportunities for the purchaser's employees to weigh trucks. Weighing services may be performed by personnel or parties approved by Forest Service. The paragraph was revised to clarify that weighing services are acceptable for scaling services.

- **B6.814 Weighing Services**

Comment 1: Computerized weighing systems do not require a weighmaster and this requirement should be eliminated.

Response: The Forest Service is aware that some weighing systems do not require a weighmaster. Nevertheless, one of the Forest Service objectives in requiring a weighmaster is to provide an additional person in the accountability chain, who has a license with the State that requires compliance with accepted weighing procedures. A truck driver does not provide this level of accountability.

Comment 2: A 70-foot platform does not account for common truck configurations in some regions and is unnecessarily restrictive.

Response: The provision provides for agreement to use short platforms. The Forest Service has no objection to reaching agreement on a shorter platform where appropriate, but is not going to make a shorter platform standard.

Comment 3: Listing eight specific requirements for scales is redundant with the requirements of State law.

Response: The eight requirements are more restrictive than some State laws and provide a required and higher level of assurance of proper weighing. For example, most State laws allow mechanical scales and hand-written scale tickets.

- **B6.842/BT6.81 Product Identification**

Comment 1: "Three square inches" should be changed to "a 2 inch diameter spot."

Response: The three square inch requirement is from the export regulations (16 U.S.C. 620 *et seq.*) and these are impractical to revise.

Comment 2: One of the permissible paint colors for marking cut trees is yellow, yet the contract specifies highway-yellow paint as the color for marking logs that cannot be exported. This is a potential conflict and risk for timber theft.

Response: The contract has always specified highway-yellow paint, which is a slightly different color than yellow tree marking tracer paint.

Comment 3: "West of the 100th meridian" should be removed from paragraph (b).

Response: No change was made, since the domestic processing yellow paint spot is not required in the East.

- **B/BT8.12 Liability for Loss**

Comment: The provision should state that adding damaged timber is by agreement and that the addition of timber applies to quantities that do not qualify as catastrophic damage. A rate redetermination is not practical for every event that damages included timber.

Response: This provision does not address adding timber. It deals solely with timber already included in the contract. B/BT2.134 - Minor Damage by Natural Causes addresses adding damaged timber in quantities that do not qualify for catastrophic damage by agreement. The contract provision requires that the nature of the included timber be significantly changed for there to be a liability for loss. In an ongoing event, such as a southern pine epidemic, it should be possible for the Forest Service and purchaser to reach agreement that the rates will be redetermined when the extent of damage is known.

- **B/BT8.2 Period of Contract**

Comment: This provision should address Waivers of Time Limit.

Response: The provision does address Waivers of Time Limit. It specifically says that contract obligations do not need to be met by the termination date if the Forest Service has given written permission to delay performance.

- **B/BT8.21 Contract Term Adjustment**

Comment 1: The provision does not address delay of the periodic payment.

Response: It is not necessary to address delay of the periodic payment. This issue is included in the contract in B/BT4.213 - Periodic Payment Schedule.

Comment 2: Paragraph (c)(i) should limit additional time to delays within the normal operation season.

Response: The Forest Service agrees that adding a requirement that the delay be in the normal operating season will clarify use of contract term adjustments and has made that change.

- **B/BT8.212 Market-Related Contract Term Addition**

Comment: The contract should provide for extensions of up to 3 years with accompanying periodic payment adjustments to allow purchasers holding uneconomic sales to complete the sales over longer periods of time.

Response: Provision B/BT8.212 does provide for extensions of up to 3 years when certain economic triggers and conditions are met. The Forest Service believes that this process is working well. Provision B/BT4.213 has been clarified to address adjusting periodic payments when additional time is authorized under B/BT8.212.

- **B/BT8.213 Delay of Award (no longer included in the proposed contract)**

Comment: It is recommended that this provision remain in the contract.

Response: The provision was removed because the remedies described in the provision would occur prior to contract award. Therefore, the appropriate location for these remedies is in the prospectus.

- **B/BT8.22 – Termination for Catastrophe**

Comment: In the absence of clear language to the contrary, following a catastrophe a contract could be terminated under either B/BT8.22 or B/BT8.34.

Response: Liquidated damages under B/BT8.34 were never intended to apply to volume not harvested as the consequence of a catastrophic event. B/BT8.22 and B/BT8.34 were changed to clarify that a termination under that subsection would not lead to a claim for liquidated damages under B/BT8.34.

- **B/BT8.221 Termination by Purchaser**

Comment: With termination under this provision, the purchaser should waive their rights to damages under B/BT8.34 - Contract Termination.

Response: Provision B/BT8.33 - Contract Suspension and Modification identifies the reasons for termination under B/BT8.34. These reasons do not include termination due to a reduction in appraised value due to catastrophic damage. Therefore, no change in the contract is necessary.

- **B/BT8.222 Termination by Forest Service**

Comment: With termination under this provision, the purchaser should waive their rights to damages under B/BT8.34 - Contract Termination.

Response: Provision B/BT8.33 - Contract Suspension and Modification identifies the reasons for termination under B/BT8.34. These reasons do not include termination for failure by the purchaser to agree to Forest Service proposed contract modifications. Nevertheless, a sentence to this effect was added for clarity.

- **B/BT8.23 Contract Term Extension**

Comment: It was recommended that a paragraph (d) be added to provide for reimbursement to the Forest Service for remarking areas that require protection under the contract.

Response: The Forest Service agrees with the concept and has added it to paragraph (c).

- **B/BT8.31 Changed Conditions**

Comment: Charging the purchaser for work that is eliminated because of changed conditions eliminates the incentive for the purchaser to work with the Forest Service to improve the timber sale.

Response: Waiver of work under changed conditions requires agreement between the purchaser and the Forest Service. The contract makes every effort to reimburse the purchaser if changes during the contract term are more expensive to the purchaser. In those cases where changed conditions reduce the cost of the sale, there should be an adjustment in favor of the Forest Service.

- **B/BT8.32 Modification for Catastrophe**

Comment 1: The provision does not address delay of the periodic payment.

Response: It is not necessary to address delay of the periodic payment. This issue is included in the contract in provision B/BT4.213 - Periodic Payment Schedule.

Comment 2: The proposed revision eliminates consultation with the purchaser and allows the Forest Service to act unilaterally and without equity considerations or expert input from purchasers.

Response: The Forest Service revised the proposed contract to return to the original language that required consultation with the purchaser. However, final determination of what timber the purchaser is allowed to harvest must be a Forest Service decision. When catastrophically damaged timber can logically be operated in a timely manner in a new and separate sale, the Forest Service needs to proceed in this manner to assure that all interested parties have an opportunity to compete for it.

- **B/BT8.33 Contract Suspension and Modification**

Comment 1: Paragraph (a)(i), as written, could result in the remedies for delay when the reason for delay is to prevent resource damage due to breach of the protection provisions of the contract by operations in wet weather.

Response: The Forest Service agrees that this provision should be constrained to situations that may require contract modification or termination and has added a qualifier to B/BT9.3.

Comment 2: In paragraph (b), a specific time should be specified; otherwise, even a short delay could result in damages.

Response: For even a short delay, a purchaser may be compensated for documented, direct out-of-pocket expenses. As the length of delay or interruption increases other remedies referenced under subsection (b) in the provision may be available to the purchaser. Comments to some of those provisions addressed only considering time lost during the Normal Operating Season. The Forest Service agrees that those remedies should only be available when operations would otherwise have proceeded had there been no suspension but also recognized that scheduled operations often occur outside the normal operating season. Only recognizing time lost during the normal operating season would be overly restrictive. Likewise, compensation should not flow if the purchaser was not or could not be operating for reasons not associated with a B/BT8.33 suspension. B/BT8.33 was clarified to address interruption of scheduled operations.

For clarification, B/BT4.22 Temporary Reduction in Downpayment, B/BT5.27 Temporary Credit for Unamortized Specified Road Construction Cost, and B/BT9.13 Temporary Bond Reduction were added to the list of remedies since each of these provisions reference B/BT8.33.

Comment 3: Suspension under paragraph (a)(iv) should be after Regional Forester approval, rather than at the discretion of the Contracting Officer.

Response: The Forest Service agrees. The Regional Forester is in a much better position to evaluate the current litigation and appeal situation and risks in the Region.

Comment 4: In paragraph (b), "demand" should be replaced with "request."

Response: The Forest Service disagrees. The "demand" for termination is intended to be a unilateral action by the purchaser when the purchaser believes that it is in its best interest to rescind its contract obligations.

Comment 5: A respondent suggested that if a sale is suspended the purchaser can demand termination after 30 days, rather than 1 year, to accelerate the compensation available with a termination.

Response: Delays and interruptions can affect individual purchasers in many different ways depending on the timing and circumstances surrounding the situation. Because of that the Forest Service believes a Purchaser should have the discretion to terminate a contract at anytime after a suspension is ordered under this provision until authorized to resume. However, the Forest Service believes that terminating a sale at the start of a suspension makes it entirely too easy for a purchaser to walk away from contract obligations, particularly for sales that may be marginally economic, yet get substantial compensation for liquidated damages. Therefore, liquidated damages under B/BT8.34 will not be available for suspensions of less than 1 year. Since many suspensions only affect a portion of a sale a statement has been added clarifying that obligations unaffected by the interruption or delay must be completed prior to the contract being termination.

Comment 6: A respondent proposed adding a detailed paragraph identifying certain additional damages related to out-of-pocket expenses involved in helicopter logging and operation logging camps.

Response: Provision B/BT8.33 provides for reimbursement of out-of-pocket expenses, which are identified in B/BT8.35 - Out-of-Pocket Expenses. The expenses identified by respondent would, in some situations, fit into one or more of the categories already included in B/BT8.35 and additional specificity is not needed.

Comment 7: A respondent proposed that if a purchaser's volume under contract was less than 1 year in unsuspended contracts, or the suspension was due to prevention of resource damage ((a)(i)) and was over 30 days, or the suspension was for other reasons ((a)(ii)-(iv)) and was over 180 days, then the purchaser would be entitled to: damages incurred, including incidental and consequential damages and that they not be limited to lost profits on the sale of logs or lumber and would include idle equipment costs and unamortized mill expenses.

Response: The Forest Service cannot assure, for example, that litigation will be resolved in 180 days, or even that we can resolve, for example, sensitive species or survey and manage issues within 30 days. In addition, many purchasers do not have 1 year of volume under contract, so any suspension would trigger these proposed damages. Forest Service sales produce logs, not lumber, and what the purchaser does with the logs is outside of the contract and at the discretion

of the purchaser, so damages cannot be measured for suspension (or termination) due to lost profits on lumber or mill expenses. When the suspension is lifted the purchaser will be able to make the anticipated profits, or if it is terminated instead, the purchaser will be entitled to liquidated damages.

Comment 8: A respondent wanted compensation for deterioration of the timber when a suspension exceeds 30 days. Further, it was proposed that the amount of compensation would be determined by the purchaser.

Response: Contract provision B/BT8.12 - Liability for Loss already provides for reimbursing purchasers for deterioration during any suspension under B/BT8.33. The method of determining reimbursement in the provision is that the Contracting Officer will make an appraisal to determine for each species the difference between the appraised unit value of timber immediately prior to the value loss and the appraised unit value of timber after the loss. Current contract rates in effect at the time of the value loss are adjusted by the differences to become the redetermined rates.

- **B/BT8.34 Contract Termination**

Comment 1: There was a concern about disputes related to determination of log value. Alternatively, it was suggested to use current contract value.

Response: The Contracting Officer determines delivered log value with the best information available. Basing damages on current contract value may not provide a fair measure of damages if stumpage rates are low. Therefore, the Forest Service retained the use of delivered log value for liquidated damages purposes.

Comment 2: The provision should not restrict the Forest Service to identifying replacement timber to only within the sale area.

Response: This proposed change conflicts with direction from the Comptroller General that timber cannot be added from outside the sale area boundary. The Forest Service is working on a revision to the regulations that would allow identification of replacement timber from within the area that was included in the environmental analysis. Until this regulation is completed, the replacement timber must come from the sale area.

Comment 3: A respondent suggested that the contract provide a minimum of 30 days to search for replacement timber and that only the purchaser should have the right to terminate the search, not either party.

Response: Since the Forest Service is precluded, at this time, from searching for replacement timber from outside the sale area, the search will most likely not take 30 days. Either party should be allowed to terminate the search if it appears fruitless.

Comment 4: Liquidated damages should be more than 7 percent of delivered log value. This level of damages does not approximate the actual damages that are incurred. This provision should be revised to provide liquidated damages of 25 percent of delivered log value.

Response: The Forest Service agrees that 7 percent of delivered log value may not be an adequate measure of actual damages. Historic profit studies, based on cost collection for residual value appraisals, indicate that profit in any year may range from losses to 21 percent, depending upon market conditions, but over an extended period of time, profit averaged 10 percent. Forest Service timber sales produce logs and the profit allowance that has historically been allowed for log production in residual value appraisals has been 10 to 12 percent. (Note: Residual value appraisals often started with lumber values and allowed a higher profit percentage because of the capital investment involved, but that was because lumber was usually the first arms-length transaction.) Litigation on timber sales for lost profits has often requested a profit of 10 percent as damages. If liquidated damages were only lost profits, the appropriate amount might be 10 percent. However, there are often other damages that are difficult to estimate and may vary considerably from one operator to another, such as lost markets due to delivery failures and lost "goodwill." There may also be some indirect expenses due to a termination, such as amortization of overhead and fixed expenses over a smaller volume that are not captured. On the other hand, a purchaser may be able to find substitute timber and have minimal damages or, because of market conditions, it may be advantageous for the volume to be terminated so that it is not harvested at a loss. All things considered, the Forest Service believes that the appropriate level for liquidated damages is 15 percent. The Forest Service will continue to monitor the application of this liquidated damages provision to determine if further adjustments may be necessary.

Comment 5: A respondent objected to having a rate redetermination be the exclusive remedy for the remaining volume when a sale is partially terminated, but did not identify what the other damages might be.

Response: Remedies for suspension are included in B/BT8.33 - Contract Suspension and Modification and this provision provides reimbursement for out-of-pocket expenses due to suspension or termination. If the volume is not terminated there are no damages, except possibly lost efficiency, which would be included in the rate redetermination provided in B/BT8.34. The Forest Service does not believe that there are damages due to termination, for volume that is not terminated, that are not measured by a rate redetermination.

Comment 6: The contract should specifically address the refund of advanced deposits for timber cut but not removed if purchaser is precluded from removing cut timber prior to the contract being terminated under this section.

Response: A statement was added under section (c) authorizing this.

Comment 7: As written there is no requirement for Purchaser to either complete all obligations on portions of a sale unaffected by an interruption or delay, or for rates to be adjusted for uncompleted work that the purchaser is prohibited from finishing in the event of a partial termination.

Response: Section (h) was added clarifying that in the event of a partial termination, purchaser must complete obligations resulting from harvest activities up to the point of the termination and that any compensation due the purchaser will be reduced by the cost of completing the unfulfilled obligations as determined by the Forest Service.

- **B/BT8.35 Out-of-Pocket Expenses**

Comment 1: There should be standards for the documentation that the purchaser submits, such as the certification requirements in B/BT9.2 - Claims.

Response: The Forest Service believes that the Contracting Officer should have the discretion to review the purchaser's documentation and analysis and other available information to determine what data and information provides the best measure of the purchaser's out-of-pocket expenses.

Comment 2: Out-of-pocket expenses do not adequately or fairly compensate purchasers for actual expenses associated with fixed cost contractual requirements. Out-of-pocket expenses should include the unamortized portion of the purchasers slash treatment, road maintenance performance, or fixed cost contractual requirements impacted by volume reductions.

Response: We have avoided an all-encompassing list of possible expenses because it is probably impossible to list every potential legitimate direct expense. Some or all of the items respondent listed could be reimbursed under the existing terms of B/BT8.35. For example, move-in and move-out expenses might include such things as unamortized dust abatement expense.

Comment 3: Out-of-pocket expenses do not adequately or fairly compensate purchasers for legal expenses associated with intervenor status.

Response: The decision to intervene or to prepare documents to help defend the Government's position is the purchaser's personal business decision and the Government will not pay legal expenses.

- **B/BT8.36 Contract Termination for Market Change (Proposed)**

Comment: Draft language is proposed to provide for termination of the contract by the purchaser if the rate redetermination provided in B/BT3.33 - Rate Redetermination for Market Change results in reductions equal to or greater than the weighted average current contract rate. The proposed provision also provides for termination by the Forest Service if agreement cannot be reached within 30 days.

Response: The Forest Service agrees that if a sale is suspended and there is a market decline so severe that the purchaser cannot be compensated by a reduction in stumpage rates that the purchaser ought to be entitled to elect termination of the contract. The Forest Service has, therefore drafted language to this effect. A corresponding edit was also made in B/BT8.33 - Contract Suspension and Modification.

- **B/BT9.11 Bond Reduction**

Comment: There should be a provision to reduce the performance bond when there is a delay, similar to what is provided for downpayments in B/BT4.22 - Temporary Reduction of Downpayment.

Response: The Forest Service agrees and has added B/BT9.13 - Temporary Bond Reduction.

- **B/BT9.2 Disputes**

Comment 1: The provision does not provide a time certain for resolution for disputes larger than \$100,000. All claims should provide for resolution within 60 days.

Response: The provision follows the requirements of the Contract Disputes Act. Claims over \$100,000 cannot always be resolved in 60 days. There are often complex issues that may require consultation at several levels of the organization.

Comment 2: The Prompt Payment Rate is used for claims, but the Current Value of Funds Rate is used in other parts of the contract. There needs to be an explanation of why the rates are different.

Response: The Contract Disputes Act requires use of the Prompt Payment Rate. The Treasury Department standard is that in addition to using the Prompt Payment Rate for claims, it should be used when the Government owes money. The Treasury standard is also that when the public owes the Government money that the Current Value of Funds Rate should be used. The Prompt Payment Rate is almost always higher than the Current Value of Funds Rate, for example the Current Value of Funds rate is currently 1.0 percent, while the Prompt Payment Rate is currently

4.0 percent. The Treasury Department website at: <http://www.cfo.doe.gov/policy/cash.htm> gives an excellent explanation of these interest rates and their use.

- **B/BT9.31 Termination for Breach**

Comment: This provision is vague. Clearly stating termination for marking undesignated timber would be better.

Response: Termination for breach is broader than just marking undesignated timber. This provision adequately describes the basis for termination.

- **B/BT9.4 Damages for Failure to Cut or Termination for Breach**

Comment 1: Where the Forest Service chooses, for reasons of its own, to retain and not attempt to re-sell the timber remaining on the sale at the time of default, the Forest Service has suffered no loss with regard to it and the defaulting purchaser should not be liable for any damages.

Response: The Forest Service disagrees with this premise. The purchaser has failed to operate and the Government has been damaged. What the Forest Service decides to do with the unharvested timber is irrelevant to the determination of damages. The Forest Service ought not to be required to dispose of its property in a certain way in order to establish damages.

Comment 2: Salary should not be included as one of the costs of resale.

Response: Salary is probably the most significant cost of resale. That is where the majority of the costs for cruising and other on-the-ground sale preparation are located. If the NEPA has become outdated and needs to be redone in order to re-sell the sale, salary is a major component of this cost too.

Comment 3: A respondent proposed qualifying paragraphs (b) and (c) so that damages only include applicable costs and to reduce damages by the amount of any transferred-in purchaser credit at time of termination.

Response: The costs referred to in paragraphs (b) and (c) are already qualified as only those costs that are applicable where they are listed in paragraph (d). Sales have not been sold with purchaser credit for nearly 5 years and few existing sales contain purchaser credit. Further, transferred-in purchaser credit would be an asset on the Timber Sale Account that could be used to pay damages. It is not necessary to list, this soon to be obsolete asset, in this provision.

Comment 4: A respondent proposed eliminating the paragraph that would require the purchaser to pay for the removal of individual unharvested trees that the Forest Service was forced to remove after default to meet resource objectives.

Response: The purpose of this paragraph is to address situations where the purchaser has partially harvested an area and only removed the valuable trees, leaving the remainder of the trees uneconomic to harvest. This paragraph is still needed.

Comment 5: A respondent proposes to limit the amount of time interest is charged, during contract preparation, for delay of receipts to a maximum of 1 year.

Response: The Forest Service believes that the purchaser should not be obligated to pay interest during contract preparation for over 1 year and has implemented this change.

- **B/BT9.41 Failure to Execute Contract (no longer included in the proposed contract)**

Comment: It is recommended that this provision remain in the contract.

Response: The provision was removed because the remedies described in the provision would occur prior to contract award. Therefore, the appropriate location for these remedies is in the prospectus.

- **WO-C/CT2.11# Timber Subject to Agreement**

Comment: The provision should allow additional description and/or options where desired. A mechanism should exist where both the Government and the purchaser are able to benefit when a product of value exists within the sale area.

Response: This provision identifies known opportunities to agree to remove material that appears uneconomic or unmarketable at the time of sale. B/BT3.41 - Material Not in A2 / Material and Quantities Not in AT2 addresses the respondent's concerns. This provision allows agreement on rates and deposits for species and products that are not identified in A/AT2 - Volume Estimate and Utilization Standards.

- **Designation by Description Provisions C/CT2.351# through C/CT2.355# in General**

Comment: There is a practical and economical need for designation by description. The Forest Service's designation by description provisions requires costly and unnecessary tree painting by the purchaser. Private forest managers find that designation without paint produces better resource protection and superior residual stand results. Designation by description, without paint, does provide for accountability.

Response: The Forest Service is a public agency and must be able to demonstrate accountability for the public's resources. Provisions C/CT2.351# through C/CT2.354# do not require that the trees be painted, except for situations where the Forest Service paints a limited number of trees; however, these provisions still provide for positive accountability for the trees that are included in the timber sale. Provision C/CT2.355# - Designation by Prescription allows for much more open-ended stand prescriptions, but requires that the purchaser make the leave trees for Forest Service approval. These five provisions provide for the accountability of the public's resources that is required. However, they are not suitable for use with many prescriptions or stands. As a public Agency, it is not acceptable to have designation provisions where it is not possible to verify after harvest that the intended, and only the intended, trees were removed.

- **WO-C/CT2.351# Designation by Spacing**

Comment 1: The measurement of spacing should be horizontal distance, not slope distance, in order to meet silvicultural prescriptions on different slopes.

Response: This change was made.

Comment 2: The provision is complicated and will result in mistakes, misunderstandings, and controversy concerning purchaser compliance. The costs of purchaser compliance may exceed the cost of Forest Service marking.

Response: The Forest Service agrees with the respondent's concerns. Designation by description is not a suitable tool in most situations. It should be recognized that, while the provision is complicated, most sales would probably have some of the blanks filled with "not applicable." The Forest Service believes that measurement procedures for tree spacing are adequately explained in the provision. Additional, more detailed, measurement procedures for stumps were added to the provision.

Comment 3: Interpretation questions should be decided in favor of the purchaser.

Response: The Forest Service believes that the provision is adequately precise that there will be no interpretation questions. Nevertheless, the Forest Service recognizes that there is opportunity for honest mistakes in identifying which trees to cut and that the selection of the proper tree could be a matter of an inch. We have eliminated the decimal points in the instructions, since they indicate a false level of precision. Mistakes by the purchaser in identifying which trees to cut will be handled under provision B/BT2.14 - Unintentionally Cut Timber. Apparent negligent carelessness in identifying the trees to be cut will be reviewed by the Contracting Officer and a Law Enforcement Officer and, depending upon the review, may be handled under provision B/BT2.132 - Negligent or Willful Damage. If warranted by the circumstances, negligent or willful cutting of undesigned trees may also be handled pursuant to 36 CFR 261.6.

- **WO-C/CT2.352# Designation by Species and Diameter**

Comment: (2 respondents) Detailed definitions of how to measure stump diameter and tree spacing needs to be included.

Response: The Forest Service believes that measurement procedures for tree spacing are adequately explained in the provision. Additional, more detailed, measurement procedures for stumps were added to the provision.

- **WO-C/CT2.353# Designation by Damage Class**

Comment 1: The provision requires precise wording in order to have all parties agree upon what timber is included.

Response: The Forest Service agrees and has revised the instructions to emphasize the need to clearly define what trees are included. In addition, interpretation questions will be discussed in the pre-operations meeting and throughout the sale with the sale administrator.

Comment 2: Interpretation questions should be decided in favor of the purchaser.

Response: The Forest Service believes that the description of the damage class will be adequately precise that interpretation questions will be rare. The Forest Service recognizes that there is opportunity for honest mistakes in identifying which trees to cut. Mistakes by the purchaser in identifying which trees to cut will be handled under provision B/BT2.14 - Unintentionally Cut Timber. Apparent negligent carelessness in identifying the trees to be cut will be reviewed by the Contracting Officer and a Law Enforcement Officer and, depending upon the review, may be handled under provision B/BT2.132 - Negligent or Willful Damage. If warranted by the circumstances, negligent or willful cutting of undesignated trees may also be handled pursuant to 36 CFR 261.6.

- **WO-C2.355# Designation by Prescription**

Comment 1 (2 respondents): The provision should identify who is going to mark the boundaries and additional cut trees and this marking should be prior to award.

Response: This suggestion was incorporated into the provision text.

Comment 2: (2 respondents) The Regional Office approval should be required for use of this provision. The provision should also clearly identify when use of the provision is appropriate, such as leave tree marking.

Response: This suggestion was incorporated into the provision instructions.

Comment 3: This provision raises many accountability problems and should be deleted.

Response: Based on the previous comment, the Forest Service has strengthened the requirements for use in the instructions to address some of the accountability problems. The Forest Service agrees that the provision should only be used with strict controls.

- **WO-C/CT3.34# (renumbered as C/CT3.35#) Scheduled Rate Redetermination**

Comment: A key sentence relating to the modifications that can be made at the time of the scheduled rate redetermination has been removed in the proposed provision.

Response: The Forest Service added the sentence to the proposed provision.

- **WO-C/CT4.25# Transfer of Purchaser Credit**

Comment 1: The formula for calculation of the transfer-in limit should contain all deposits required to be paid in cash.

Response: Required deposits must be paid in cash. Transferred-in purchaser credit can only be used to pay for timber. The formula is designed to protect the cash needs that the Government has that are part of the stumpage for timber, specifically KV and salvage fund needs. In addition, while reviewing the respondent's proposal, the Forest Service identified a critical statement that was excluded from this provision while changing it from Division B/BT to Division C/CT. The following edit has been made to the last paragraph:

"Charges against transferred-in purchaser credit shall be limited to timber value in excess of Base Rates, except transferred-in purchaser credit shall be considered equivalent to cash for advance deposits. ~~notwithstanding the B/BT4.2 prohibition on using transferred-in purchaser credit for Base Rate charges."~~

Comment 2: A respondent provided a clarification on how the transfer-in limit should be calculated as part of a contract modification.

Response: The Forest Service has made this suggested change in the provision.

Comment 3: Transfer should not be limited to monthly, but should be allowed as often as purchaser credit is available for transfer.

Response: From an administrative workload standpoint, the Forest Service believes that monthly transfers are frequent enough.

- **WO-C/CT4.33 Performance Bond As Security for Felled Timber**

Comment: Using the performance bond as security for payment complicates things.

Response: This provision is intended to assist purchasers with their cash flow when the Regional Forester has approved its use and deterioration of felled timber is not a concern. This provision is for optional use, based on a purchaser's request, and the Forest Service believes that it is a valuable assistance to some purchasers and should be retained.

- **WO-C/CT5.111# Right-of-way Reversion**

Comment: A respondent is concerned that the editorial change to this provision may make it less likely that purchasers would qualify for a contract term adjustment.

Response: It was not the Forest Service's intent to change the meaning. The Forest Service believes that contract term adjustments under this provision continue to have the same requirements.

- **WO-C/CT5.213# Deposit for Reconstruction Engineering Services**

Comment: A respondent would like the instructions to specify the Forest Service party that determines that the sale will not become deficit due to stumpage rate adjustment and to provide recourse for the purchaser when the stumpage does drop after award of the contract.

Response: The Forest Service does not project indices. The respondent is correct that the instructions could be interpreted to imply that projections are made. The instructions were changed to clarify this. When markets decline and costs do not decline, there is a negative effect on the purchaser. This deposit is one of those costs. The contract provides a number of remedies that attempt to assist the purchaser for market declines.

- **WO-C/CT5.214# Deposit for Actual Reconstruction**

Comment: A respondent would like the instructions to specify the Forest Service party that determines that the sale will not become deficit due to stumpage rate adjustment and to provide recourse for the purchaser when the stumpage does drop after award of the contract.

Response: The Forest Service does not project indices. The respondent is correct that the instructions could be interpreted to imply that projections are made. The instructions were changed to clarify this. When markets decline and costs do not decline, there is a negative effect on the purchaser. This deposit is one of those costs. The contract provides a number of remedies that attempt to assist the purchaser for market declines.

- **WO-C/CT5.221# Material Sources**

Comment 1: The practice of not adjusting unit rates unless the adjustment is to the advantage of the Forest Service is not equitable.

Response: The Forest Service agrees and the suggested change was made. The Forest Service should identify the lowest available cost. The purchaser can then go to any source they choose that meets specifications. If they can do this at a lower cost, they should be able to reap the benefits of this.

Comment 2: The Forest Service practice of confiscating excess purchaser-produced material has been abused by the Agency. Rewrite the provision so that the purchaser has the option of using the excess material on another National Forest project, selling the material to the Forest Service, or selling the material to another purchaser for use on National Forest projects.

Response: The contract is for the sale of timber, not for the sale or production of construction material. The Forest Service cannot be obligated to purchase excess construction material when the purchaser produces more than is required for a project or allow it to be sold by the purchaser for use off the National Forest. The provision allows for agreement to use the material on other National Forest sales. Agreement to use the construction material is the best way to handle the situation because there may be many factors involved, such as the time between production of the material and its proposed use on another sale. When revised, the Timber Sale Administration Handbook will be written to encourage cooperation with the purchaser to use the excess material on other National Forest sales.

- **WO-C/CT5.31# Road Maintenance Requirements**

Comment: The Road Maintenance Specifications should be referenced.

Response: The Road Maintenance Specifications are referenced in this provision and B/BT5.3 - Road Maintenance makes them part of the contract.

- **WO-C/CT5.32# Road Maintenance Deposit Schedule**

Comment: This schedule should only establish rates for material required for removal under the contract. The Contracting Officer should calculate a rate for opted material based on the opted material to be removed and the purchaser's commensurate use.

Response: The Forest Service agrees and believes that the contract provides for this. The provision provides for adjustment of road maintenance deposits commensurate with the purchaser's use.

- **WO-C/CT6.24# Site Specific Special Protection Measures**

Comment 1: The provision should provide direction on the symbols to use on the sale area map.

Response: Direction is now provided in the instructions.

Comment 2: For clarification and conciseness, a respondent suggested eliminating the qualifier that the known areas needing special protection are shown on the sale area map or on the ground.

Response: This qualifier is included because the Forest Service only has the capability to identify known areas and to identify the protection needed for known areas. At a later time, other areas may be discovered.

- **WO-C/CT6.32# Protection of Reserve Trees**

Comment: An editorial simplification of the wording is suggested.

Response: The Forest Service agrees and has made this change.

- **WO-C6.816# Scaling Deposits**

Comment: Revised language is proposed that would single-out overhead expenses within the provision as one of the expenses included in scaling deposits. In addition, the proposed language would remove all instructions on how to calculate scaling deposits.

Response: The Forest Service does not believe that it is necessary to specifically identify overhead expenses within the provision language. Overhead expenses do not relate to Forest Service or purchaser contract obligations. Further, the Forest Service believes that the instructions for the provision should identify how to calculate the scaling deposits.

- **WO-C6.842/CT6.81 Product Identification**

Comment 1: "Three square inches" should be changed to "a 2 inch diameter spot."

Response: The three square inch requirement is from the regulations and these are impractical to revise.

Comment 2: Two of the permissible paint colors for marking cut trees are yellow and green, yet the contract specifies highway-yellow paint as the color for marking logs that cannot be exported

and highly-visible green for logs that can be shipped from Alaska to the lower 48 States. This is a potential conflict and risk for timber theft.

Response: The contract has always specified highway-yellow paint, which is a slightly different color than yellow tree marking tracer paint. Highly-visible green paint is also distinctly different than green tree marking tracer paint. If green and yellow paint become a problem, the permissible colors for cut tree marking will be revised.

- **C/CT8.65 Use of Timber**

Comment: There appears to be a conflict between paragraph (b) and paragraph (f)(iv). Paragraph (b) says that export is illegal and paragraph (f)(iv) says that there may be legal export.

Response: There is no conflict. Export is legal for species determined to be surplus.